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Cellular Telecommunications Industry Association

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Petition for Rule Making
RM _____

Dear Ms. Dortch:

Today, April 29, 2002, the Cellular Telecommunications & Internet Association ("CTIA") hand-delivered the attached Petition for Rule Making to be filed with the Commission. An original and four copies of this Petition for Rule Making are being filed with the Commission. Please date-stamp and return to the messenger the extra copy of the petition. Thank you for your assistance in this matter. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Meghan Smith
Paralegal
(202) 736-3256

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Cellular Telecommunications & Internet	)
Association's Petition for Rule Making Concerning	)
the Biennial Review of Regulations Affecting	)
CMRS Carriers	)

To: The Commission

PETITION FOR RULE MAKING OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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April 29, 2002

SUMMARY

CTIA files this Petition for Rule Making urging the Commission to review, on an expedited basis, *all* regulations affecting CMRS carriers. CTIA's Petition urges the Commission to forbear from imposing unnecessary mandates on CMRS carriers, consistent with its statutory obligations under Section 11 of the Communications Act, as amended by Section 202(h) of the Telecommunications Act of 1996, and consistent with the legal standard of review recently affirmed by the U.S. Court of Appeals in *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027 (D.C. Cir. 2002).

Section 11 requires the Commission to repeal any regulations where it cannot make an affirmative finding that the rules are necessary to serve the public interest. In *Fox*, the court vacated an FCC rule, first adopted in 1970, and subsequently retained in the FCC's first Biennial Review, that prohibited common ownership of a cable system and a broadcast television station in the same local market. The court addressed the standard of proof the Commission must use to justify retaining any of its rules under the Section 11 Biennial Review. The court affirmed, "*The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.*" The court determined that the Commission applied too lenient a standard when it concluded only that the rule in question "continues to serve the public interest" and not that it was "necessary in the public interest." Thus, in conducting its Biennial Review of all CMRS regulations, the Commission must demonstrate that the regulation is necessary and not merely show that it continues to serve the public interest.

In its Petition for Rule Making, CTIA identifies many regulations that affect wireless carriers that are no longer necessary and must be repealed or modified in accordance with the standard of review pronounced in the *Fox* decision. Although many of the rules identified are the subject of prior petitions or docketed proceedings, CTIA explains that the Commission cannot simply roll these pending petitions and proceedings into the 2002 Biennial Review. Rather, the Commission must apply the legal standard of review set forth in *Fox*, which dictates that the mandates affecting CMRS carriers must be repealed or modified. CTIA notes that even the FCC's analysis of the *Fox* decision supports such an outcome. In the FCC's Memorandum of Law supporting its Petition for Rehearing or Rehearing *En Banc* recently filed in the Court of Appeals, the FCC concedes that "the *Fox* decision could be read to mean that the Commission must repeal a rule under Section [11] unless it can conclude...that the rule is indispensable or essential to achieving its regulatory goal...or unless it could satisfy the higher standard of showing that the rule was 'necessary,' in the sense of vital or indispensable, to fostering diversity or competition." Finally, CTIA urges the Commission to act quickly in commencing its review.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Cellular Telecommunications & Internet	)
Association's Petition for Rule Making Concerning	)
the Biennial Review of Regulations Affecting	)
CMRS Carriers	)

To: The Commission

PETITION FOR RULE MAKING OF
THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

Pursuant to Sections 1.41, 1.49, 1.401 and 1.430 of the Commission's Rules,[1] the Cellular Telecommunications & Internet Association ("CTIA")[2] hereby submits a Petition for Rule Making concerning the Commission's Biennial Review of regulations affecting CMRS Carriers. Section 11 of the Communications Act commands the Commission to review its regulations "in every even-numbered year" and "repeal or modify any regulation it determines is no longer necessary in the public interest."[3] Unlike past years, where the Commission issued a "Staff Report" in the even-numbered year, and commenced specific rule making proceedings based on

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[1] 47 C.F.R. §§ 1.41, 1.49, 1.401 and 1.430 (2001).

[2] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[3] 47 U.S.C. § 161, Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996)(codified as Section 11 of the Communications Act of 1934, as amended, 47 U.S.C. § 161).

the staff recommendations in the subsequent year, CTIA urges review, on an expedited basis, of *all* regulations affecting CMRS carriers. Moreover, CTIA urges the Commission to follow the standard of review adopted by Congress that, as the Court of Appeals in *Fox Television Stations, Inc. v. FCC*,[4] recently stated, "might better be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.') than to the wait-and-see attitude of the Commission."[5] To assist the Commission's review, CTIA has identified many, but certainly not all, of the regulations affecting wireless carriers that are no longer necessary and must be repealed or modified under the biennial review required by Section 11.

I. STANDARD OF REVIEW

CTIA files this Petition to urge the Commission to forbear from imposing unnecessary regulations on CMRS carriers, consistent with its obligation under Section 202(h) of the Telecommunications Act of 1966. Specifically, CTIA urges the Commission to repeal its regulations affecting wireless carriers where the Commission cannot make an affirmative finding that the rules are necessary to serve the public interest.

CTIA believes that the 1996 amendments that added Section 11 to the Communications Act of 1934 clearly direct the Commission to trust in market forces and limit government regulation to instances where there is an identifiable market failure. Section 11 requires the

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[4] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*"); Petition for Rehearing or Rehearing *En Banc* docketed, (Nos. 00-1222, *et al*) (D.C. Cir. April 19, 2002). The Court of Appeals decision remains binding on the FCC for the time it remains in effect. *See City of Cleveland v. FCC*, 561 F.2d 344, 346 (D.C. Cir. 1977); 47 U.S.C. § 402(h).

[5] *Fox*, 280 F.3d at 1044.

Commission to repeal any regulations where it cannot "make an affirmative finding that the rules are necessary to serve the public interest."[6] The Commission goes further and states that the recent *Fox* decision "could be read to mean that the Commission must repeal a rule under Section 202(h) unless it can conclude, for example, that the rule is indispensable or essential to achieving its regulatory goal."[7] Indeed, according to the FCC, the *Fox* decision could require the Commission to repeal any rule in the biennial review process "unless it could satisfy the higher standard of showing that the rule was 'necessary,' in the sense of vital or indispensable, to fostering diversity or competition."[8] CTIA agrees that Section 11 imposes a high standard of review on the Commission in conducting its biennial review. There would be no purpose to Section 11 unless Congress intended to raise the bar the Commission must surmount to retain its existing rules. Accordingly, Congress directed the FCC to remove regulatory obstacles to the development of vigorous competition in all segments of the telecommunications market.

In Section 202(h) of the Telecommunications Act of 1996, Congress directed the Commission to review its regulations every two years to determine whether "any such regulation is no longer necessary in the public interest as the result of meaningful economic competition

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6 *Hearing on the FCC's FY 2003 Budget Estimates Before the Subcomm. on Commerce, Justice, State, and the Judiciary of the House Committee on Appropriations*, 107th Cong. 2D SESS. (Apr. 17, 2002) (statement of Michael Powell, Chairman, Federal Communications Commission)("Powell Testimony"), available at < http://www.fcc.gov/Speeches/Powell/Statements/2002/stmkp207.pdf>, at 2

7 FCC Brief at 5, *Fox*; Petition for Rehearing or Rehearing *En Banc*, (D.C. Cir. April 19, 2002) ("FCC Brief").

8 *Id.*, at 8.

between providers."[9] Section 202(h) requires that the Commission "repeal or modify any regulation it determines to be no longer in the public interest."[10] Earlier this month, Chairman Powell committed the Commission to being proactive and expending the necessary resources to determine whether its media ownership rules "truly promote competition, diversity and localism, or whether today's media market requires different approaches."[11] The FCC rules affecting CMRS providers require no less of a review.

Section 11 commands the Commission to repeal any regulations that no longer serve the public interest. As noted above, the recent *Fox* decision addressed the standard of proof the Commission must meet to justify retaining any of its rules under the statutory required Biennial Reviews. In *Fox,* the court vacated an FCC rule, first adopted in 1970, and subsequently retained in the Commission's first Biennial Review, that prohibited common ownership of a cable system and a broadcast television station in the same local market.[12] The court stated: "the Commission appears to have applied too low a standard. The statute is clear that *a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.*"[13] In

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[9] 47 U.S.C. § 161, Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).

[10] 47 U.S.C. § 161(b) (stating that "the Commission shall repeal or modify any regulation it determines to be longer necessary in the public interest").

[11] Powell Testimony, at 2.

[12] *Fox*, 280 F.3d at 1042 (D.C. Cir. 2002). The court concluded that the Commission's rules violated Section 202(h), requiring the biennial regulatory review of media ownership rules; however, the decision referenced Section 402 of the Act, a similar review requirement for all FCC rules.

[13] *Fox,* 280 F.3d at 1050 (emphasis added).

other words, in conducting the biennial review of its regulations, the Commission's statutory obligation is met by showing that the regulation is "necessary" and not merely by showing that it "continues to serve the public interest."[14]

CTIA strongly agrees with Chairman Powell that *Fox* places "'a substantially higher burden on the FCC to justify the rules it chooses to keep in place" and the new standard "is something we'll have to adjust to immediately."[15] Section 11, as described in the *Fox* decision, creates "a presumption in favor of repealing or modifying the ownership rules."[16] The Court criticized the Commission's narrow reading of its responsibility to conduct the biennial review, writing that the Congressional mandate "might better be liked to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.') than to the wait-and-see attitude of the Commission."[17] In *Sinclair Broadcast Group, Inc. v. FCC*, a different panel of the D.C. Circuit also rejected the "cautionary approach [to the Section 11 biennial review] employed by the FCC" since "the Commission's wait-and-see approach cannot be squared with its statutory mandate promptly ... to 'repeal and modify' any rule that is not 'necessary in the public interest.'"[18]

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[14] *Fox*, 280 F.3d at 1050 (faulting the FCC for applying "too lenient a standard when it concluded only that the [the rule at issue] 'continues to serve the public interest,' and not that it was "necessary" in the public interest.").

[15] TELECOMMUNICATIONS REPORTS, Feb. 25, 2002, at 2 (quoting Chairman Michael Powell).

[16] *Fox*, 280 F.3d at 1048. The same standard applies to the FCC's regulations affecting CMRS carriers. *See supra* note 13.

[17] *Fox*, 280 F.3d at 1044.

CTIA urges the Commission to act quickly to commence its review, on an expedited basis, of *all* regulations affecting CMRS carriers and to fulfill its statutory mandate to "repeal and modify" any rule that is not "necessary in the public interest." To assist the Commission "jump start" the 2002 Biennial Review, CTIA has identified many, but certainly not all, of the regulations affecting wireless carriers that are no longer necessary and must therefore be repealed or modified. These rules are described in the next section.

II. RULES AFFECTING CMRS CARRIERS THAT ARE NO LONGER NECESSARY AND MUST BE REPEALED OR MODIFIED

Nearly all of the rules identified in this section have been the subject of prior petitions or docketed proceedings. In many instances, these rules are the subject of open proceedings, including proceedings that date back to the still uncompleted 2000 Biennial Review. For these open proceedings, where the Commission has the benefit of a full record, the Commission should accelerate its biennial review obligations by applying the Section 11 legal standard described above to the existing record. It would frustrate the Congressional purpose that underlies Section 11 to roll these open proceedings into the 2002 Biennial Review when only the standard of review, and not new facts, dictates their repeal or modification. Thus, for example, the Commission should apply Section 11, as directed by the Court of Appeals, to the Part 22 rule changes that are included in the pending 2000 Biennial Review. Not only would it serve no purpose to transfer the review of these challenged rules from the 2000 (and still pending) Biennial Review to the review that is the subject of this Petition, it would offend the clear intent

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[18] *See Sinclair Broadcast Group, Inc. v. FCC*, No. 01-1079 (D.C. Cir. Apr. 2, 2002) ("*Sinclair*"), (Sentell, J.,dissenting) (citing *Fox*, 280 F.3d at 1042).

of the Telecommunications Act of 1996 amendments, which added Section 11 to the Communications Act of 1934.

The following regulations affecting CMRS carriers are organized for simplicity in the order they are listed in the Code of Federal Regulations. There are other regulations affecting CMRS carriers, not included on this list, that are no longer necessary, and the Commission must consider repealing or modifying all such regulations during the 2002 Biennial Review.

1. PART 1 – PRACTICE AND PROCEDURE: SUBPART E – COMPLAINTS, APPLICATIONS, TARIFFS, AND REPORTS INVOLVING COMMON CARRIERS

The Commission should eliminate Section 1.815 of the Commission's Rules, which requires licensees to file an annual employment report.[19] Section 1.815 duplicates the reports that carriers must file with the federal and state EEO agencies and the annual reporting requirement serves no FCC regulatory purpose. The Commission should eliminate this provision since it is nothing more than a duplicative filing and a needless burden of paperwork.

2. PART 1 – PRACTICE AND PROCEDURE: SUBPART F – WIRELESS TELECOMMUNICATIONS SERVICES APPLICATIONS AND PROCEEDINGS

Under Section 1.923, applicants filing ULS Forms 601 and 603 are required to provide all requested information, including information regarding "pending" non-FCC litigation.[20] The Commission has repeatedly stated that unless and until there is an adverse judgment, pending

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[19] 47 CFR § 1.815 (requiring each licensee with 16 or more full time employees to file an annual employment report).

[20] *See* 47 CFR § 1.923 (stating "Applications must contain all information requested on the applicable form and any additional information required by the rules in this chapter"); 47 CFR § 1.923(b)(ii) (describing applicant information on litigation: title of the proceeding, the

litigation is not material to a licensee's qualifications. Requiring information relating to non-FCC litigation results in "offlining" applications, burdening staff, and delaying swift action on routine filings. The question on the ULS Forms 601 and 603 should be deleted, because there is no reason why the collection of such information from carriers is necessary in a competitive market.

Applicants filing ULS Forms 601 and 603 are also required to provide a significant amount of data regarding foreign ownership even when the Commission has already approved such ownership. Thus, the foreign ownership question on ULS Forms 601 and 603 is an unnecessary and burdensome reporting requirement that has little, if any, correlation to the FCC's Section 310(b) analysis required *prior to* approval of such ownership. Accordingly, the question should be deleted from ULS Forms 601 and 603, and replaced with a simple yes/no question as to whether the applicant complies with Section 310(b).

The Commission also should amend Section 1.924(d), which requires a CMRS provider to obtain approval for wireless facilities within the FCC Quiet Zone Rules for the Arecibo Observatory.[21] The Commission should eliminate this unnecessary interval of FCC approval, particularly since the Observatory is willing to provide written approval for wireless modifications.[22] As explained in the 2000 Biennial Review proceeding concerning Quiet Zones

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docket number, and any legal citations).

[21] 47 CFR § 1.924(d).

[22] *See In the Matter of Review of Quiet Zones Application Procedures Notice of Proposed Rulemaking*, FCC 01-333, WT Docket No. 01-319, Biennial Review 2000 Comments

application procedures, the provision should be eliminated because it creates unnecessary delay in the provisioning of service in Puerto Rico.[23]

Section 1.935 requires applicants to obtain Commission approval of agreements to withdraw applications, petitions, informal objections or other pleadings against an application.[24] The Commission's approval process for such agreements is often the cause of lengthy delays. Moreover, the approval of such agreements is unnecessary in a competitive CMRS market, particularly when the Commission has the authority to request documents in specific cases. Thus, Section 1.935 should be eliminated.

3. PART 1 – PRACTICE AND PROCEDURE: SUBPART Q – COMPETITIVE BIDDING PROCEEDINGS

Section 1.2105 requires applicants to submit a Short-Form application providing detailed information regarding the ownership of the applicant.[25] Such ownership information is unnecessary because the information will be relevant only if the applicant is a high bidder, and at that time the applicant is required to submit a Long-Form application disclosing ownership data. Section 1.2105 places a burden of needless paperwork on auction applicants.

Section 1.2111(b) requires applicants for transfers of control or assignments of licenses obtained through competitive bidding to file certain transaction documents and other materials

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of Alloy LLC ("Cingular Comments") at 8 (filed Jan. 22, 2002).

[23] *See id.*

[24] 47 CFR § 1.935 (Agreements to dismiss applications, amendments or pleadings.).

[25] 47 CFR § 1.2105(a)(2)(ii)(B) (requiring applicants to submit applicant ownership information as set forth in § 1.2112 in the Short-Form application).

with the Commission.[26] This requirement, however, is duplicative and unnecessary given that the Commission already has separate rules governing unjust enrichment, which are sufficient to ensure that auction winners benefiting unfairly from bidding credits disgorge such benefits.[27] Furthermore, the scope of the current rule is so broad that it applies to all applicants, regardless whether the transfer of control or assignment involves a license obtained pursuant to the FCC's eligible designated entities rules.

4. PART 1 – PRACTICE AND PROCEDURE: SUBPART I – PROCEDURES IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 ("NEPA")

To ensure that market forces continue to spur growth in CMRS services as well as stimulate the deployment of competitive broadband wireless services, the Commission must streamline NEPA compliance and review procedures imposed on CMRS providers. Moreover, it is critical that the Commission implement these streamlined procedures in a timely manner. As demonstrated in CTIA's Biennial Review 2000 Comments, [28] the FCC's existing NEPA procedures cannot be squared with respect to the prompt and reasonable resolution of issues related to the siting of wireless facilities on or near historic properties. Six years after the passage of the Telecommunications Act, the Commission and other Federal agencies persist in

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[26] 47 CFR § 1.211(b).

[27] *See e.g.*, 47 CFR § 22.943(b).

[28] *See Public Notice,* Biennial Review 2000 Staff Report Released, FCC 00-346 (rel. Sept. 19, 2000), CC Docket No. 00-175, Biennial Review 2000 Comments of the Cellular Telecommunications Industry Association ("CTIA Biennial Review 2000 Comments"), at 11-14.

fostering an unwieldy bureaucracy that cannot respond effectively and quickly to market and government demands for the swift deployment of competitive wireless services. [29]

Wireless carriers compete for subscribers based on coverage area, network quality and network reliability. These dynamics are contingent on the timely and cost effective manner in which carriers can construct and site wireless facilities. It is imperative that the Commission streamline the NEPA process.

Section 1.1307(a)(4) defines actions that may have a significant environmental effect for which Environmental Assessments (EAs) must be prepared.[30] In its recent efforts to streamline the Section 106 process, the Commission recognized the futility and significant delays in deployment caused by its practice of requiring applicants to file an Environmental Assessment ("EA") even when there is a finding of "no effect" or "no adverse effect."[31] Accordingly, the

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[29] While the Commission, the Advisory Council on Historic Preservation ("ACHP") and the National Council of State Historic Preservation Officers ("NCSHPO") adopted the Nationwide Collocation Programmatic Agreement ("Agreement") in March 2001, it took the Commission over ten (10) months to issue the requisite guidance document instructing CMRS service providers and SHPOs on how they should implement the Agreement. Consequently, many SHPOs refused to implement the Agreement until the FCC issued its guidance thereby using the Agreement as a sword, rather than as a shield, against unreasonable delays in the siting process.

[30] 47 CFR § 1.1307(a)(4)

[31] *Public Notice*, Wireless Telecommunications Bureau and the Mass Media Bureau Announce the Release of a Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement, DA 02-28, rel. Jan. 10, 2002, 10 ("Fact Sheet") (http://wireless.fcc.gov/siting/environment.html#collocation). *See also Public Notice*, Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures ("Collocation Programmatic Agreement"), DA 01-691, rel. March 16, 2001.

Commission recently adopted a policy whereby it no longer requires applicants to file an EA with the Commission under Section 1.1307(a)(4) if a State Historic Preservation Officer ("SHPO") has concurred in a proposed finding of "no effect" or "no adverse effect" on a property listed or eligible for listing in the National Register. Furthermore, the Commission has streamlined Section 1.1307(a)(4) by limiting its scope wherein the rule does not apply to collocations that are exempted under the Nationwide Collocation Programmatic Agreement. To ensure the consistent regulatory treatment of a "no effect" or "no adverse" finding, the Commission should amend Section 1.1307(a)(4) to reflect this change in practice.

In 47 CFR § 1.1306 NOTE 1, the Commission supports and encourages the use of existing buildings, towers or corridors as an environmentally desirable alternative to the construction of new facilities, *i.e.*, collocation. While the Commission's rules generally provide for an exclusion for "for the mounting of antenna(s) on an existing building or antenna tower," this exclusion is not applicable to historic preservation considerations.[32] In an effort to streamline the Section 106 process, the Collocation Programmatic Agreement exempts all collocations of antennas on pre-existing towers or structures from Section 106 review, unless one of the exceptions set forth in the Agreement applies. While the Agreement is an initial step in streamlining the Section 106 process, it stops short of "grandfathering" pre-existing towers and structures that have not undergone Section 106 review prior to March 16, 2001. Thus, the underlying tower or structure that supports the collocation could still be challenged under the Section 106 review process, independent of the collocation process. Such a result undermines

[32] 47 C.F.R. § 1.1306(b)(3), Note 1.

the Commission's policy and support for collocation. Furthermore, it significantly reduces any incentive for carriers and public safety agencies to collocate on the thousands of towers or structures built prior to March 16, 2001.[33]

It is not economically feasible for the Commission, the ACHP or SHPOs to conduct a Section 106 review of the large number of commercial, government and public safety towers that were erected prior to March 16, 2001, but have not undergone Section 106 review. These pre-existing towers and structures are built and permit commercial, government and public safety entities to provide services to the public. Requiring applicants to dismantle or make major modifications to the towers or other structures would not serve the public interest. Accordingly, CTIA recommends that the Commission exempt towers or structures built prior to March 16, 2001, from the Section 106 review process.

Pursuant to 47 CFR § 1.1308(b) NOTE 2, the Commission must solicit the comments of the Department of Interior with respect to threatened or endangered species or designated critical habitats, and the SHPO and ACHP with respect to historic properties, in accordance with their established procedures. While CTIA, the ACHP, the Commission, and the NCSHPO have worked cooperatively to streamline the SHPO and ACHPs review and comment process, there has been very little progress to date. There are far too many SHPOs that prolong the Section 106 review process well beyond the 30-day comment period established under the ACHP's Section

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[33] According to CTIA's Semi-Annual Wireless Industry Survey, there were more than 104,000 cell sites that were commercially operational prior to March 16, 2001. This number does not include government and public safety cell sites or cell sites owned by tower companies. *See* CTIA's Wireless Industry Indices: Semi-Annual Data Survey Results, at 139 (rel. Dec. 2001).

106 procedural rules.[34] The FCC's failure or refusal to hold SHPOs to the requisite period of time has resulted in significant delays in the FCC's approval of applications seeking to construct wireless facilities on or near historic properties. Moreover, the SHPO's ineffective and arbitrary implementation of the FCC's and ACHP's procedures and deadlines have significantly impeded the timely review of pending applications. Too often, SHPOs implement and interpret the FCC's and ACHP's streamlined procedures and time schedules as they deem appropriate. These inconsistent interpretations of federal rules, and inconsistent local implementation efforts often vary within the same office or from one state to another.[35]

Such varied interpretations and implementation result in inconsistent determinations and create significant uncertainty for wireless telecommunications companies attempting to site on or near historic properties. Consequently, the FCC's regulations generally have had a dilatory

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[34] *See* 36 CFR § 800.3(c)(4)(2001).

[35] *See, e.g.,* Delaware State Historic Preservation Office, *Guidelines for Architectural and Archaeological Surveys in the State of Delaware* (visited Dec. 19, 2001) <http://www.state.de.us/shpo/survey%20manual%20for%20draft%20circulation.txt>; Oregon State Historic Preservation Office, *Section 106 Cell Tower Guidelines* (visited Dec. 19, 2001) <http://shpo.prd.state.or.us/images/pdf/shpo_sect106_celltower.pdf>; New Mexico State Historic Preservation Office, *Guidelines for Evaluating Proposed Telecommunications Facilities under Section 106 of the National Historic Preservation Act* (visited Dec. 19, 2001) , <http://www.nmmnh-abq.mus.nm.us/hpd/about/contents/forms/cellguidelines.pdf>. *See also,* Florida Department of State Division of Historical Resource, *Guidelines for Section 106 Review of Proposed Cellular Tower Locations* (visited Dec. 19, 2001), <<http://dhr.dos.state.fl.us/bhp/compliance/106_FCCGuidelines2.pdf>>; Missouri Department of Natural Resources Historic Preservation Program (HPP), *Section 106 Project Information Form, HPP 106 Survey Memo Form, and A Guide to the Completion of the HPP 106 Survey Memo,* (visited Dec. 19, 2001), <http://www.mostateparks.com/hpp/sectionrev.shtm>.

effect, which contravenes the goals, and policies the Commission and the ACHP attempted to achieve by streamlining their processes to facilitate timely Section 106 review.

Accordingly, CTIA recommends that the Commission eliminate its practice of allowing SHPOs to delay their response to the Commission's solicitation of comments. Rather, the Commission must enforce the 30-day time limit for a SHPO's response. While many SHPOs contend that they do not receive sufficient documentation from an applicant to provide a timely review, this contention can be quickly resolved by the Commission adopting the Standard Documentation Guidelines developed by the ACHP's Tower Working Group. Such action would be a significant step in streamlining the FCC's Section 106 process.[36]

There are several major issues associated with the FCC's policies and procedures governing the solicitation of SHPO review and comments that significantly hinder the construction and buildout of the wireless infrastructure. While the Section 106 historic review process requires applicants to consult with State Historic Preservations Officers ("SHPOs") in determining whether a siting project may have a significant adverse impact on the historic property, there are no limitation on the SHPOs' review authority, nor any standards upon which SHPOs must base their objections. As a result, there are no means of reviewing the reasonableness of SHPO objections. SHPOs are free to pick any point on the map, between one inch and 100 miles, to object to a proposed siting project. The fact that SHPO review lacks

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[36] The Standard Documentation Guidelines provide SHPOs with a checklist of appropriate documents and data that an applicant should provide for a Section 106 review. Once the SHPO receives the appropriate documentation from the applicant, the 30-day review period commences. Hence, the SHPO's receipt of the documentation is the objective basis for triggering the 30-day SHPO review.

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adequate standards is amply demonstrated in the several examples that CTIA provided in its comments to the ACHP's proposed Section 106 rules and NTIA's inquiry concerning broadband deployment.[37]

Too often, wireless carriers encounter significant delays in the siting process because the eligibility of a historic property is undetermined or has been pending for a considerable period of time. While the SHPO is responsible for maintaining and ensuring that the state's register of historic properties is current, wireless carriers often encounter instances in which a state register is outdated or missing significant information concerning eligible historic property. It is very difficult for carriers to assess the impact of a proposed site when the information concerning the eligibility of a historic property is uncertain or the information concerning a specific property is outdated or incomplete.

This issue can be addressed by providing SHPOs with an incentive to address the eligibility of a historic property in a timely and reliable manner. There should be a streamlined regulatory process that creates a rebuttable presumption that a carrier has met its obligations under Section 106 by making reasonable efforts to determine whether the siting of a wireless facility on or near a historic property has a significant adverse effect, unless the SHPO has previously made a formal determination concerning the eligibility of a historic property and that

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[37] *See Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, Department of Commerce, National Telecommunications and Information Administration, *Notice*, Docket No. 011109273-1273-01 (Nov. 10, 2001); Comments of the Cellular Telecommunications & Internet Association, 22-23 (filed Dec. 20, 2001). *See also* Comments on Proposed Rules to Revise 36 CFR Part 800 *et. seq.*, "Protection of Historic Properties" Filed on Behalf of the Cellular Telecommunications Industry Association, 18-20, http://www.wow-com.com/filing/pdf/ctia090100.pdf.

determination is duly recorded in the appropriate public files.

The FCC's and the ACHP's current Section 106 rules and procedures do not provide appropriate incentives for carriers to site wireless facilities within areas that fall within certain categorical exclusions or exempted federal undertakings.[38] While the FCC supports the desire of the wireless industry, the ACHP, and the National Council of State Historic Preservation Officers to address these impediments in a Programmatic Agreement, there is significant concern that the Federal agencies will not develop and implement the Programmatic Agreement in a reasonable and timely manner.

5. PART 6 -- ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH DISABILITIES; AND PART 7 -- ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

The wireless industry has a strong interest in ensuring that its customers with disabilities

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[38] While the Commission has indicated that the construction and registration of towers are federal undertakings, CTIA strongly recommends that the Commission revisits this decision, particularly in light of the evolution of wireless services since 1988, *i.e.*, the deployment of PCS and ESMR services, wireless information services, broadband and advanced wireless services. In *Cellular Telecomm. Industry Ass'n. v. Slater et al.*, the Court determined that it is the Federal agency, not the ACHP, that has the authority to determine what agency activities constitute a federal undertaking under the National Historic Preservation Act. As demonstrated in Sprint PCS' Petitions for Reconsideration of the Nationwide Collocation Programmatic Agreement and Verizon Wireless' Comments filed a year ago, the Commission allocates and licenses spectrum to wireless carriers and does not license or issue construction permits for the siting of wireless facilities. Thus, it is highly questionable whether the siting of wireless facilities on or near historic properties even constitutes a federal undertaking to bring such activities within the purview of the Section 106 process. *See In the Matter of Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, DA 00-2907, Sprint PCS Petition for Reconsideration and Clarification (filed May 2, 2001); Comments of Verizon Wireless (filed May 14, 2001).

have access to advanced wireless services. Competition, not regulation, offers the best means of bringing wireless technological innovations and solutions to people with disabilities, and ensuring that they are not relegated to relying on antiquated technology to meet their needs. To bring the benefits of emergency and advanced telecommunications to people with disabilities, the Commission has imposed several regulatory mandates under Part 6, Part 7, and Section 20.18(c) of the Commission's Rules. However, the unintended consequence of such mandates is that the Commission continues to rely on regulatory fiat, rather than competition, to bring wireless technological innovations and solutions to consumers with disabilities. Indeed, the underlying assumption is that consumers benefit more from heavy-handed regulation than the proven track record of innovations that characterize competitive wireless services. Moreover, the Commission's mandates require CMRS carriers to invest significant resources to develop "backwards compatible" technical solutions in order to achieve accessibility, *i.e.*, making advanced digital technologies compatible with antiquated technologies, rather than supporting a regulatory philosophy and process that encourages consumers with disabilities to migrate from antiquated technologies to advanced digital technologies that offer the functions and benefits they desire.[39] This regulatory philosophy has resulted in inefficient and short-term solutions that do not meet consumers' needs nearly as well as new technologies. SMS messaging is just one

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[39] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Fourth Report and Order* (rel. Dec. 14, 2002). *See also Public Notice,* Wireless Telecommunications Bureau Seeks Comment on Request for Temporary Waiver of Deadline By Which Digital Wireless Systems Must Be Capable of Transmitting 911 Calls from TTY Devices, CC Docket No. 94-102 (Mar. 19, 2002) (seeking comment on two waiver requests from wireless service providers to extend the deadline to upgrade their systems to achieve TTY compatibility and to integrate TTY compatibility with the PSAP).

example of how wireless information services are providing people with disabilities access to telecommunications and emergency services.[40] Accordingly, the Commission should eliminate accessibility rules that impose backward compatibility solutions on advanced digital technologies.

The convergence of telecommunications and information services provides competitive alternatives that negate the need for disparate rules for similar services that fall under the very different Title II and Title I requirements. As the Commission establishes the appropriate regulatory treatment for information and broadband services that are not covered under Title II,

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[40] In January 2002, a local police department in London introduced a mobile phone text messaging service to help people who are deaf or hard of hearing contact police in an emergency. A survey conducted in conjunction with the British Institute of the Deaf "revealed that 98 percent of hearing impaired people use text messages to communicate, while 85 percent said they would find the link with the police useful, and 83 percent of those surveyed said they would be keen to sign up to the service." *See* Samantha Clarke, *Police Add Message Texting to Armoury; Hard of Hearing Will Find It Much Easier to Contact Officers,* COVENTRY EVENING TELEGRAPH, Dec. 29, 2001, at 16.

See also Jane Bird, *When It's Handsets to the Rescue*, THE LONDON TIMES, Mar. 28, 2002; *Deaf Driver to Text AA*, GLASGOW EVENING TIMES, July 16, 2001, at 18 (announcing a new system that allows motorists who have speech or hearing difficulties to contact an auto club directly when their cars break down on a highway with the use of text messaging from mobile phones). Vandana Sinha, *Instant Messaging Aids Communication for Disabled People*, THE VIRGINIAN-PILOT, Nov. 26, 2001 (noting that text messaging "opened up a whole new world" for a 17-year old student who is deaf. "It enabled us [his parents] to let him move around freely....He feels a sense of independence.")

"In the past year [2000-2001] the number of SMS messages sent worldwide increased fivefold, to 200 billion. In December [2000] alone, Germans sent a staggering 1.8 billion." Daniel Rubin, *Messaging Connects the Deaf to the Mobile Phone Universe*, SAINT PAUL PIONEER PRESS, Sept. 17, 2001, at E1 (underscoring the widespread use of SMS messaging over mobile phones in Europe and Asia, and how people with hearing disabilities are embracing the technology.) *See also SMS Allows Hearing-Impaired Enjoy Mobile Lifestyle*, CHANNEL NEWSASIA, Aug. 10, 2001.

i.e., voice over IP, text messages (including SMS offered by CMRS carriers), and unlicensed ("wi-fi") wireless services connected to a cable modem, it should forbear from regulations that may thwart the development of innovative services. To the extent that competitive alternatives exist, the Commission should treat telecommunications services and close-substitute information services alike, and not apply Parts 6 and 7 of the Commission's Rules to these similar services.[41] The Commission's recent authorization of cost recovery for Internet Protocol ("IP") relay service is one step towards meeting the Commission's goals of providing such benefits to the disabilities community.[42]

6. PART 17 – CONSTRUCTION, MARKING, AND LIGHTING OF ANTENNA STRUCTURES

In the 2000 Biennial Review, CTIA, among others, urged the Commission to streamline Part 17 of its rules, which sets forth the requirements for construction and coordination of wireless communications facilities.[43] While the Commission has recognized that some of its Part 17 rules warrant modification,[44] the Commission has failed to synchronize the FAA and FCC

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[41] The Commission also should modify 47 CFR §51.100(a)(2), which prohibits telecommunications carriers from installing the most advanced new technologies and capabilities unless they comply with Section 255 and 256 of the Act, to the extent there are competitive services being offered by non-telecommunications carriers.

[42] *See News Release*, FCC Authorizes Recovery of Costs for New Technology for TRS Users, CC Docket No. 98-67 (rel. Apr. 18, 2002).

[43] *See* CTIA's Biennial Review 2000 Reply Comments; Cingular Biennial Review 2000 Comments at 7; USTA Biennial Review 2000 Comments at 9.

[44] *See* Biennial Review 2000 Staff Report, Appendix IV, at 21 (stating that certain rules "could be modified or eliminated without compromising the public safety goals embodied in this rule part.")